Supreme Court, U.S.
FILED
MAR 27 1980
MICHAEL RODAK, JR., CLERK

No. 79-1202

In the Supreme Court of the United States

OCTOBER TERM, 1979

FORREST ALLEN PARKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	5
Conclusion	13

CITATIONS

Cases:

Alderman v. *United States*, 394 U.S. 165	6
Blumenthal v. *United States*, 332 U.S. 539	12
Brown v. *United States*, 411 U.S. 223	6
Jones v. *United States*, 362 U.S. 257	5
Katz v. *United States*, 389 U.S. 347	6
Kotteakos v. *United States*, 328 U.S. 750	12
Rakas v. *Illinois*, 439 U.S. 128	6, 8
Rawlings v. *Kentucky*, No. 79-5146 (argued Mar. 26, 1980)	6, 8
Simmons v. *United States*, 390 U.S. 377	6
United States v. *Barrera*, 486 F.2d 333, cert. denied, 416 U.S. 940	12
United States v. *Baucom*, 611 F.2d 253	6
United States v. *Byers*, 600 F.2d 1130	6
United States v. *Crowell*, 586 F.2d 1020, cert. denied, 440 U.S. 959	6
United States v. *Grunsfeld*, 558 F.2d 1231, cert. denied, 434 U.S. 872	6
United States v. *Kirk*, 534 F.2d 1262, cert. denied, 430 U.S. 906	12
United States v. *Rios*, 611 F.2d 1335	6

Cases—Continued Page

United States v. *Riquelmy*, 572 F.2d 947.. 6
United States v. *Russo*, 527 F.2d 1051, cert. denied, 426 U.S. 906 12
United States v. *Salvucci*, No. 79-244 (argued Mar. 26, 1980) 6, 7, 8
United States v. *Varelli*, 407 F.2d 735 12
United States v. *Ventresca*, 380 U.S. 102.. 10

Constitution and statutes:

United States Constitution, Fourth Amendment 2, 6, 7, 8
18 U.S.C. 371 2
18 U.S.C. 2314 2

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OPINION BELOW

The order of the court of appeals (Pet. App. A-1 to A-7) is noted at 607 F.2d 1008.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1979. The order of the court of appeals was amended, and a petition for rehearing was denied, on December 6, 1979 (Pet. App. A-8 to A-9). On December 27, 1979, Mr. Justice Stevens granted an extension of time to and including February 4, 1980, within which to file a petition for a writ of certiorari (Pet. App. A-10), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's Fourth Amendment rights were violated by searches, pursuant to federal warrants, of his house and of a vacant, unrented apartment.

2. Whether the district court properly denied petitioner's request for a jury instruction on multiple conspiracies.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Illinois, petitioner was convicted on one count of conspiracy to transport stolen goods in interstate commerce, in violation of 18 U.S.C. 371.[1] He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. A-1 to A-9).

The evidence at trial, the sufficiency of which is not disputed, showed the following.[2] In December 1974, various antiques, including jade birds, were stolen from the Grob residence in St. Louis, Missouri (Tr. 234-238). In October 1975, other antiques, including Tiffany art glass, Tiffany lamps and shades, and silver flatware, were stolen from the Sinaiko residence in Dunn, Wisconsin (Tr. 95-100, 114).

[1] A three-count indictment charged Raymond Bryan, Sharon Bryan, Joseph Crimi, Robert Eaves, Norman Owens, and petitioner with conspiracy to transport stolen goods in interstate commerce, in violation of 18 U.S.C. 371, and also charged the first three defendants with interstate transportation of those stolen goods, in violation of 18 U.S.C. 2314. Before trial, the two Bryans and Owens pleaded guilty. On March 29, 1978, the jury returned guilty verdicts against petitioner, Crimi, and Eaves.

[2] The government's evidence consisted in part of telephone conversations recorded pursuant to court-authorized wiretaps.

In early 1975, Joseph McGirr, then in San Diego, was asked if he could locate a buyer for some of the jade birds, which were transported to Nevada and then to California from co-defendant Ray Bryan's home in St. Louis (Tr. 291-294, 299-301). Later that year, McGirr visited Bryan in Missouri and saw one of the stolen Tiffany antiques in Bryan's home (Tr. 119, 121, 302, 304, 307). In early 1976, McGirr and Bryan drove to Florida, where Bryan sold one of the stolen lamps for a price between $4,000 and $7,000 (Tr. 305, 308, 776). On February 18, 1976, Bryan and McGirr, using co-defendant Joseph Crimi's car,[3] again went to Florida with more of the antiques, including Tiffany glassware and jade birds (Tr. 310-347, 597, 602-604, 609-611, 717-718). Before departing, Bryan spoke with petitioner on the telephone and asked him to come over to pick up "something" (Tr. 399-400, 607-608). Later that day, a Chevrolet fitting the description of petitioner's car was seen parked in Bryan's driveway (Tr. 679).

On April 5, 1976, after Bryan had returned home from Florida, he received a telephone call from his brother-in-law, co-defendant Bobby Eaves, who said he had a buyer for some of the antique Tiffany lampshades (Tr. 901-905). Bryan responded that he did not have any lampshades in his house but that he might be

[3] Crimi had been selling some of the stolen lamps and jade birds for Bryan in the St. Louis area (Tr. 545-559).

able to obtain some. Bryan then made arrangements to meet petitioner at 11:00 the following morning (Tr. 906, 910-912) and immediately called Al Eaves, Bobby's son, to inform him of the meeting (Tr. 911-912). The next day, at the appointed time, Bryan and another man entered petitioner's house and emerged a short time later with petitioner. The three men drove away in petitioner's car (Tr. 653-657).

That afternoon, FBI agents, acting pursuant to a federal warrant, prepared to search petitioner's home (Tr. 931). While the agents were gathering outside, petitioner called Ray Bryan to tell him of the impending search, which caused Bryan to become upset (Tr. 913-914). The agents then entered petitioner's house. After they had advised petitioner of his rights, petitioner requested permission to telephone his attorney, Norman London. While petitioner was on the phone, the agents overheard him reply, "[Y]eah, Norm, they're after the lamps" (Tr. 934). Thereafter, petitioner left the premises for approximately one hour while the search was in progress (Tr. 935). In the course of the search, the agents seized several items stolen from the Grob residence, including three jade elephants and two jade birds (one of which bore the fingerprints of Ray Bryan) (Tr. 936, 1008-1009). The agents also photographed but did not seize several items stolen from the Sinaiko residence (Govt. Exhs. 21 and 24; Tr. 935-938).

In the meantime, a local police detective was engaged in surveillance of a duplex located at 3759 and 3761 Upton Street, St. Louis, Missouri. Petitioner

paid the rent for the occupant of 3759 Upton, one Janet Schaughnessy. The other half of the duplex, 3761 Upton, was vacant (Tr. 823-826, 831). On April 6, 1976, at the time when petitioner was away from his house while it was being searched, a woman fitting Ms. Schaughnessy's description carried a bag from 3759 Upton to 3761 Upton, which she entered with a key.[4] The woman then exited 3761 Upton without the bag. This was repeated three more times, and on each trip the woman carried something heavy into the 3761 unit and left it there (Tr. 831-834). On April 8, 1976, FBI agents searched 3761 Upton Street pursuant to a federal warrant and discovered several items stolen from the Sinaiko home, including a silver butter knife on which petitioner's fingerprints were found (Tr. 942, 997-999, 1013-1014).

ARGUMENT

1. a. Petitioner argues (Pet. 7-9) that he has "standing" to contest the search of the unoccupied apartment at 3761 Upton Street because he paid the rent on Janet Schaughnessy's adjacent apartment in the duplex and because he claims a possessory interest in the stolen goods seized during the search.[5]

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[4] The key to the 3761 unit had been left with Ms. Schaughnessy for her to return it to the landlord after the previous tenant died (Tr. 822-823).

[5] Petitioner does not appear to assert that he has "automatic standing" under *Jones* v. *United States*, 362 U.S. 257 (1960). The "automatic standing" doctrine is limited to cases in which "possession of the seized evidence is itself an essential element of the offense with which the defendant is charged

It is well settled that the Fourth Amendment protects individuals from unreasonable invasions of their legitimate expectations of privacy. See, *e.g.*, *Rakas* v. *Illinois*, 439 U.S. 128, 143 & n.12 (1978); *Alderman* v. *United States*, 394 U.S. 165, 179 n.11 (1969); *Katz* v. *United States*, 389 U.S. 347 (1967). "'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.'" *Rakas* v. *Illinois*, *supra*, 439 U.S. at 133-134, quoting *Alderman* v. *United States*, *supra*, 394 U.S. at 174. Accordingly, "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. *Alderman*, *supra*, at 174." *Rakas* v. *Illinois*, *supra*, 439 U.S. at 134.[6]

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* * *." *Simmons* v. *United States*, 390 U.S. 377, 390 (1968). See also *Brown* v. *United States*, 411 U.S. 223, 229 (1973). Here, petitioner was indicted for conspiracy, a crime that is not a possessory offense within the meaning of the "automatic standing" rule. See, *e.g.*, *United States* v. *Rios*, 611 F.2d 1335, 1345-1346 (10th Cir. 1979); *United States* v. *Baucom*, 611 F.2d 253, 255 (8th Cir. 1979); *United States* v. *Byers*, 600 F.2d 1130, 1132 (5th Cir. 1979); *United States* v. *Crowell*, 586 F.2d 1020, 1026 (4th Cir. 1978), cert. denied, 440 U.S. 959 (1979); *United States* v. *Riquelmy*, 572 F.2d 947, 951 (2d Cir. 1978); *United States* v. *Grunsfeld*, 558 F.2d 1231, 1241-1242 (6th Cir.), cert. denied, 434 U.S. 872 (1977), 1016 (1978). Hence, the present case need not be held pending decision on the continued validity of the "automatic standing" rule in *United States* v. *Salvucci*, No. 79-244 (argued Mar. 26, 1980), and *Rawlings* v. *Kentucky*, No. 79-5146 (argued Mar. 26, 1980).

[6] The Court in *Rakas* abandoned the concept of "standing" under the Fourth Amendment, stating that "the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing" (439 U.S. at 139). In this analysis, the relevant "question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect" (439 U.S. at 140).

Here, petitioner's Fourth Amendment rights were not violated by the search of the vacant apartment at 3761 Upton. Petitioner neither rented nor occupied the searched apartment, nor had the owners of the apartment given him permission to store goods in it, and he has suggested nothing to indicate that he had any legitimate expectation of privacy with respect to it. The fact that petitioner paid the rent on the adjacent apartment for Janet Schaughnessy, or that Ms. Schaughnessy had fortuitously been asked to return to the landlord the prior tenant's key for the 3761 unit, does not establish any constitutional interest of petitioner in the searched premises. In these circumstances, petitioner was not entitled to seek suppression of the evidence seized during the search of 3761 Upton.

Nor can petitioner challenge the validity of this search simply because he asserts a possessory interest in the stolen property that was seized. As we argue in our reply brief in *United States* v. *Salvucci*, No. 79-244 (argued Mar. 26, 1980), a defendant's interest in contraband, such as stolen property, that is

seized during a search does not by itself serve to allow him to contest the underlying search.[7] In any event, whatever the disposition in *Salvucci* and *Rawlings*, petitioner's contention is wholly untenable here, where the property in question was not legitimately placed on the premises, but rather was secreted there by a trespass. Petitioner thus can no more claim that the action of placing "his" stolen property in the apartment vested him with Fourth Amendment rights to challenge the search of the apartment than a burglar could claim that his presence during an illegal search empowered him to challenge that search. See *Rakas* v. *Illinois*, *supra*, 439 U.S. at 143-144 n.12.

b. On the merits of his Fourth Amendment claim, petitioner contends (Pet. 9-13) that the warrant to search his residence and the warrant to search the vacant apartment at 3761 Upton Street were invalid because they were not supported by probable cause.

The warrant to search petitioner's house was based largely on the affidavit of Agent Schultz. This affidavit, which incorporated the results of court-authorized wiretaps, specifically recited that FBI agents overheard a telephone conversation between Ray Bryan and Bobby Eaves at approximately noon on

[7] A copy of the government's briefs in *Salvucci* is being sent to petitioner's counsel. The issue whether a defendant can challenge a search solely on the basis of his possessory interest in the seized contraband is also presented in *Rawlings* v. *Kentucky*, *supra*. Because, as discussed below, the search of the apartment at 3761 Upton was lawful, there is no need to hold the instant case pending decision in *Salvucci* and *Rawlings*.

April 5, 1976, to the effect that Eaves agreed to sell "some shades" for Bryan and that Bryan would be "go[ing] over there and see some people" (Tr. 903-904); that at 4:02 p.m. Bryan telephoned petitioner and made arrangements to come by that evening (Pet. 10; Tr. 905-906); that during the evening Al Eaves, Bobby's son, telephoned Bryan and was told that Bryan did not have the "things" yet and that he would be contacted if Bryan heard anything (Tr. 908-909); that at 9:45 p.m. petitioner telephoned Bryan and asked him to come over to petitioner's house at 11:00 the next morning (Tr. 911); and that after finishing his conversation with petitioner, Bryan immediately called Al Eaves to say that they were "going to meet him over at his house at eleven" (Tr. 912). In addition, another affidavit, dated March 2, 1976, and attached to Agent Schultz's affidavit, described several recorded conversations on February 26 and February 27, 1976, to the effect that Bryan, after selling a portion of the stolen property in Florida, had some money to give petitioner (Pet. 10; Tr. 624-627).[8] In sum, the affidavit showed that Bryan was engaged in an effort to locate the stolen Tiffany shades, that Bryan made arrangements to go to petitioner's home to pick up the shades, and that petitioner had been paid by Bryan immediately following an earlier stolen-

[8] This phone conversation does not contain "stale facts" relative to the proposed search of petitioner's residence on April 6, 1976, as petitioner contends (Pet. 12), but rather demonstrates the likelihood that petitioner would be involved in the April 6 stolen-property transaction since he had previously been paid by Bryan after a similar transaction.

property transaction in Florida. Thus, tested in a commonsense fashion (*United States* v. *Ventresca*, 380 U.S. 102, 108 (1965)), the application for a search warrant furnished probable cause to believe that petitioner's residence contained the stolen Tiffany shades.

With respect to the search on April 8 of the unoccupied apartment at 3761 Upton Street (and assuming that petitioner was entitled to challenge this search), the affidavit supporting the application for the warrant adequately demonstrated probable cause to believe that the apartment contained stolen antiques. In addition to the foregoing facts, which were adopted by reference, the affidavit stated that on April 6, during the period petitioner was absent from his house while it was being searched, Janet Schaughnessy made repeated trips from her apartment to the adjacent unit at 3761 Upton where she left several heavy items (Pet. 12; Tr. 822-834). The affidavit further stated that the agents intercepted a telephone call on April 7, 1976, in which petitioner stated his concern to Bryan that a girl's home might be searched, that he believed her apartment was "clean," but that she had "some things that * * * you can buy and pawn" (Pet. 12; Affidavit of Agent Schultz, para. 30). This information sufficed to establish probable cause to issue a search warrant for the vacant apartment at 3761 Upton Street.

2. Petitioner asserts (Pet. 13-17) that the evidence at trial showed separate conspiracies with respect to each of the two thefts, only one of which involved him,

and that the district court therefore erred in denying his request for jury instructions on multiple conspiracies.

The court of appeals (Pet. App. A-9) correctly rejected this argument. The record in this case fully supports the court's conclusion (*ibid.*) that there was "a single, albeit attenuated, agreement among various parties to perform different functions in order to effectuate the unitary objective of the conspiracy—the interstate transportation of property stolen from the Grob and Sinaiko residences for purposes of sale." In particular, the items from the two thefts were treated together by the conspirators in their efforts to dispose of the stolen property. For example, as the court of appeals observed (*ibid.*), "[co-conspirator] Crimi endeavored to locate purchasers and negotiate sales of the property stolen in both thefts, and Crimi's automobile was used by co-conspirator Bryan to transport property from both thefts to Florida where Bryan effected the sale of items from both thefts."

With regard to petitioner's involvement in the conspiracy, the evidence showed that property stolen from both the Grob residence and the Sinaiko residence was discovered in petitioner's house, including one item from the Grob burglary that bore Bryan's fingerprint (Pet. App. A-9; Tr. 935-938, 1008-1009); that petitioner's fingerprints were found on property stolen from the Sinaikos in Wisconsin and seized during the search of the vacant apartment at 3761 Upton Street in St. Louis (Tr. 942, 947-999, 1013-1014);

and that petitioner was overheard during a telephone conversation to say that the FBI had come to his house looking for "the [Sinaikos'] lamps" (Tr. 934). This evidence adequately established the existence of a single conspiracy, and the fact that all members of the conspiracy had not met each other (Pet. 4-5, 14) is immaterial. See, *e.g.*, *Blumenthal* v. *United States*, 332 U.S. 539, 556-558 (1947). Accordingly, the district court properly declined to charge the jury on multiple conspiracies. See, *e.g.*, *United States* v. *Kirk*, 534 F.2d 1262, 1269 (8th Cir. 1976), cert. denied, 430 U.S. 906 (1977); *United States* v. *Russo*, 527 F.2d 1051, 1059 (10th Cir. 1975), cert. denied, 426 U.S. 906 (1976); *United States* v. *Barrera*, 486 F.2d 333, 339 (2d Cir. 1973), cert. denied, 416 U.S. 940 (1974).[9]

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[9] Petitioner's reliance on *Kotteakos* v. *United States*, 328 U.S. 750 (1946), and *United States* v. *Varelli*, 407 F.2d 735 (7th Cir. 1969), is misplaced. In both of those cases, the presence of common participants in various criminal activities was held to be insufficient to show a single conspiracy comprised of otherwise unrelated crimes that were not joined together by a shared stake in the overall venture. Here, in contrast, the evidence amply proved a single conspiracy involving mutual efforts to achieve a common end.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1980

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